

Fees and Surcharges: Consequences of a Conviction

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A. The Fees and Surcharges

Pursuant to P.L. §60.35, anyone convicted in an administrative tribunal or court of the state of a felony, misdemeanor, or violation as defined in P.L. §10.00, shall have levied against him/her at the time of sentencing several fees and surcharges. P.L. §60.35(1)(a).¹ The Vehicle and Traffic Law separately authorizes fees and surcharges for crimes thereunder. See V.T.L. §§1809; 1809-c(1). The Parks, Recreation and Historic Preservation Law does the same in §27.12. The fees and surcharges currently authorized by the Penal Law and some of those authorized by the Vehicle and Traffic Law are set out. As noted below, some of the fees and the surcharge have been increased several times since their initial passage.

1. Mandatory surcharge: P.L. §60.35(1)(a)(i)-(iii)
(first effective on May 12, 1982).
felony: \$250
misdemeanor: \$140
violation: \$75
2. Crime Victim Assistance Fee: P.L. §60.35(1)(a)(i)-(iii)
(first effective on April 19, 1989).
felony: \$20
misdemeanor: \$20
violation: \$20

1. The only violations to which the fees and surcharges apply are those in the Penal Law. P.L. §60.35(7).

3. Town and Village court fee: P.L.§60.35(9)(first enacted in 1998).
4. Sex Offender Registration Fee: P.L.§60.35(1)(a)(iv) (first enacted in 2003).

Anyone convicted of a sex offense as defined in Correction Law §168-a(2) and (3) must pay a \$50 fee. P.L.§168-a(2) defines sex offenses as a conviction for particular completed crimes or attempts under the Penal Law. For some of the crimes listed proof of facts different from the elements defining the crime are required. In addition, some are crimes under other state or federal statutes with elements common to crimes defined in New York. Each case needs to be individually examined.

5. DNA databank fee: P.L.§60.35(1)(a)(v) (first enacted in 2003).

Anyone convicted of an offense defined in Executive Law §995(7) must pay a \$50 fee. These offenses include assault, homicide, sex offenses, incest, kidnapping, arson. The list is extensive.

6. Supplemental sex offender victim fee: P.L.§60.35(1)(b) (first enacted in 2004).

Anyone convicted of a felony or misdemeanor as defined in P.L. Art. 130 (sex offenses), P.L.§255.25 (incest), or P.L. Art. 263 (sexual performance by a child) shall pay a \$1000 fee.

7. V.T.L. 1809 surcharges and fees
(first enacted in 1983).²

V.T.L. §1809, setting fees and surcharges, is effective until September 1, 2005. Historically this statute has had a sunset clause and has been regularly extended.

Mandatory surcharge:

traffic infraction conviction pursuant to V.T.L. Article 9: \$25 (V.T.L. §1809(1)(a));

felony conviction pursuant to V.T.L. §1192: \$250 (V.T.L. §1809(1)(b)(i));

misdemeanor conviction pursuant to V.T.L. §1192: \$140 (V.T.L. §1809(1)(b)(ii));

other V.T.L. offense convictions (with exceptions): \$45 (V.T.L. §1809(1)(c)).

Crime Victim Assistance Fee:

traffic infraction conviction pursuant to Article 9: \$5 (V.T.L. §1809(1)(a));

conviction under V.T.L. §1192: \$20 (V.T.L. §1809(1)(a));

other V.T.L. offenses (with exceptions): \$5 (V.T.L. §1809(1)(c)).

Town and Village Court Fee: \$5 (V.T.L. §1809(9));

Conviction pursuant to V.T.L. §1192: \$25 (V.T.L. §1809-c(1)). This provision was added in 2003.

2. Despite the complexity of the V.T.L. sections set out here, there are other applicable provisions.

The mandatory surcharge and crime victim assistance fees under V.T.L. §1809(1) are not imposed if the surcharge and the fee are imposed pursuant to P.L. §60.35.

Starting on February 16, 2005, the fees and surcharges apply “to sentences imposed upon a youthful offender finding.” P.L. §60.35(10). The amount of the mandatory surcharge and the crime victim assistance fee is that specified for the crime that was the basis of the youthful offender adjudication. P.L. §60.02. The crime victim assistance fee may be waived for anyone eligible for youthful offender treatment if the imposition of the fee would work an unreasonable hardship on the defendant or immediate family or other dependent. C.P.L. §420.35(2). See Donnino, 39 McKinney Penal Law, Additional Supplementary Practice Commentary to §60.35, 2005 Pocket Part at 23-24.

B. Ex Post Facto Issues

The mandatory surcharge under P.L. §60.35 and V.T.L. §1809 has been increased four times³ since its effective date of May 12, 1982.

The crime victim assistance fee, first enacted in 1989, has been increased three

3. May 12, 1982: \$75; May 17, 1985: \$100; May 25, 1990: \$150; April 1, 2000: \$200; November 11, 2003: \$250.

times.⁴ The 1989 statute specifically applied the fee to crimes that took place on or after April 19, 1989, and the 1991 statute applied the increase to crimes committed on or after June 12, 1991. The 2000 legislation included effective dates. However, the 2000 legislation became law 45 days after the stated effective date. The fee and surcharge were increased in 2003 and the effective date was November 11, 2003. See also V.T.L. §1809(8).

The general approach of the courts has been to apply ex post facto principles to determining what fee and surcharge should be imposed and the courts have imposed those in effect at the time of the crime. People v. McQueen, 11 A.D.3d 1005 (4th Dept. 2004), lv. denied, 4 N.Y.3d 765 (2005); People v. Sullivan, 6 A.D.3d 1175 (4th Dept.), lv. denied, 3 N.Y.3d 648 (2004); People v. Hagar, 5 A.D.3d 981(4th Dept. 2004); People v. Moye, 4 A.D.3d 488 (2d Dept.), lv. denied, 2 N.Y.3d 803 (2004); People v. Goldwire, 301 A.D.2d 677, 678 (3d Dept. 2003); People v. Fabela, 240 A.D.2d 677, 678 (2d Dept.), lv. denied, 90 N.Y.2d 939 (1997); People v. Vasalka, 233 A.D.2d 412 (2d Dept. 1996), lv. denied, 89 N.Y.2d 989(1997); People v. Ancrum, 182 A.D.2d 521(1st Dept.), lv. denied, 80 N.Y.2d 926 (1992).

The DNA databank fee and the sex offender registration fee were enacted in

4. April 19, 1989: \$2; June 21, 1991: \$5; April 1, 2000: \$10; November 11, 2003: \$20.

2003 and made effective on May 15, 2003. The supplemental sex offender victim fee was added in 2004. The effective date was stated to be April 1, 2004, but the legislation did not become law until 142 days later, on August 20, 2004. The Commentaries state that the ex post facto clause should apply here, too. There are no cases yet. See Doninno, 39 McKinney Penal Law, section 60.35, Practice Commentary at 427-28; Main Volume Supplementary Practice Commentary at 428 (2004) and 2005 Cumulative Pocket Part at 23.

C. Payment

If the defendant is required to make restitution and makes the restitution before sentence is imposed, the defendant is not required to pay the mandatory surcharge or the crime victim assistance fee. P.L. §60.35(6); V.T.L. §1809(6). However, if the restitution is not made before sentence is imposed, the judge must impose both the fee and surcharge as well as restitution. People v. Quinones, 95 N.Y.2d 349 (2000). The defendant can seek a refund of the fees and surcharges after restitution is paid pursuant to P.L. §60.35(4) and V.T.L. §1809(4). *Id.* at 352. People v. Ziolkowski, 9 A.D.3d 915 (4th Dept.), *lv. denied*, 3 N.Y.3d 683 (2004).

The fees and surcharges must be paid to the clerk of the court. P.L. §60.35(3). The mandatory surcharge and crime victim assistance fee can be paid by credit card and a reasonable administrative fee may be added to the fee and surcharge. C.P.L.

§420.05.

D. Collection from Defendants Incarcerated for Fewer than 60 days⁵.

An offender who is not incarcerated or who will be incarcerated for fewer than 60 days must pay the fees and surcharges within 60 days of the imposition of sentence. At the time of sentence all courts must, and the Town and Village Courts may, issue a summons directing the offender to appear before the court in the event that the fees and surcharges are not paid within the 60 days. The date for appearance is the first court day after the 60th day after the imposition of the fees and surcharges. P.L. 60.35(8). The summons must state the name of the court, the name of the defendant, that if the fees and surcharges are not paid the defendant must appear, and the date and time of the required appearance.

The procedures for determining how to treat the non-payment of a mandatory surcharge, sex offender registration fee, DNA databank fee and a crime victim assistance fee are set out in C.P.L. §420.10, §420.40, and §430.20, which are made applicable to the fees and surcharges (except for the supplemental sex offender victim fee) by C.P.L. §420.35.

C.P.L. 420.10(1) allows the sentencing court to order the defendant to pay the

1. C.P.L. §420.35(1) and §420.40 apply to surcharges and fees under the V.T.L. and Parks, Recreation and Historic Preservation law.

entire amount when the sentence is imposed, to pay the entire amount at a later time, or to pay designated portions at specific intervals. The payment can be a condition of probation.

As of 1995, C.P.L. §420.30(3) prohibited remission of the mandatory surcharge. In 2004, the section was expanded to prohibit remission of the sex offender registration fee, DNA databank fee and the crime victim assistance fee. As of 2004, C.P.L. 420.35(2) prohibited waiver of these fees and surcharges. The one exception both for remission and waiver is the crime victim assistance fee where the defendant is eligible for youthful offender status. That fee can be waived for an eligible youth if the unreasonable hardship test is satisfied.

Pursuant to C.P.L. §420.40(2), on the appearance date of the summons issued pursuant to P.L. §60.35(8) (Note: section 420.40(2) incorrectly states that the summons is issued pursuant to P.L. §60.35(3)), if the defendant has not paid the mandatory surcharge, sex offender registration fee, or DNA databank fee, the defendant may present information showing that the payment of these three required payments would work a unreasonable hardship on the defendant or his immediate family.

If the evidence is found by the judge to meet the unreasonable hardship test, the judge may defer payment of these three required payments and must state the factual reasons for doing so. C.P.L. §420.40(4). The written order of the judge deferring

payment is filed with the court and it becomes a civil judgment under the Civil Practice Law and Rules. C.P.L. 420.40(5).

If the court finds that the payment will not cause unreasonable hardship on the defendant or his family, the judge can impose a prison sentence of up to 15 days for refusal to pay C.P.L.§420.35(1). There is a sentence in the section that is not complete, but appears to say that incarceration cannot be ordered until the fee or surcharge is “satisfied.” It is unclear if the imprisonment is discretionary.

C.P.L.§420.40 does not include the crime victim assistance fee and the supplemental sex offender victim fee as fees that can be deferred and converted to a civil judgement. However, C.P.L.§420.35 does refer to the crime victim assistance fee and states that §420.40 covers that fee. It is arguable that the crime victim assistance fee can be deferred under the statute and imprisonment imposed for improper refusal to pay. However, because there is no reference to the \$1,000 supplemental sex offender victim fee, it is unclear whether the fee is deferrable and whether a prison term can be imposed for non-payment. Nevertheless, because it is unconstitutional to imprison a person for non-payment if the person has no funds and if the claim is made that the \$1,000 is not paid because of indigence, procedures for determining indigence will likely be required despite the statutory omission.

Although C.P.L. 420.10 is made applicable to the “unreasonable hardship”

proceedings by C.P.L.§420.35, it is uncertain how C.P.L.§420.10 should be used in light of the detail provided in C.P.L.§420.40 and the authority given in C.P.L.§420.35 to impose a prison term. Finally, C.P.L.§430.20(5) deals with instances in which a judge orders incarceration of a defendant until he/she pays the fees. The section explains how to calculate the prison time if there is also a prison sentence imposed and what to do if there is no sentence.

E. Collection from Defendants Serving More than 60 Days in Prison

If the fee or surcharge is not paid to the clerk of the court and the defendant is in custody for more than 60 days, the clerk must notify the authorities at the institution at which the defendant is held of the failure to make the payment. The money owed is to be taken from the defendant's inmate fund, which consists of money in the defendant's possession at the time he/she enters the institution, funds earned in work release, and other funds received by him/her at the institution. P.L. §60.35(5);⁶ V.T.L.§1809(5). No summons is issued for defendants sentenced to more than 60 days in custody.

P.L.§60.35(8) authorizes sanctions pursuant to P.L.§60.30 for non-payment of fees and surcharges by those defendants sentenced to custody for more than 60 days.

6. There are two sub-sections numbered 5. One applies until September 5, 2005, and the other after September 5, 2005.

Section 60.30 permits a court to order forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty.

In the past many defendants have applied for waiver of the mandatory surcharge and crime victim assistance fee at the time of sentence or a remission of the fee and surcharge while in custody serving a prison sentence. Many courts have held that applications to avoid payment can be made only when the defendant has been released from prison after serving any sentence imposed. See, e.g. People v. Bradley, 249 A.D.2d 103 (1st Dept.), lv denied, 92 N.Y.2d923(1998); People v. Gamble, 248 A.D.2d 896 (3d Dept. 1998); People v. Otero, 245 A.D.2d 116 (1st Dept. 1997); People v. Burke, 204 A.D.2d 345 (2d Dept. 1994); People v. Ancrum, 182 A.D.2d 521; People v. Snell, 161 A.D.2d 1125 (4th Dept.), lv. denied, 76 N.Y.2d 796 (1990). But see People v. Kistner, 291 A.D.2d 856 (4th Dept.2002); People v. Abdus-Samad, 274 A.D.2d 666 (3d Dept.), lv. denied, 95 N.Y.2d 862(2000).

The prohibition on waiver and remission of the mandatory surcharge, DNA fee, sex offender registration fee and the crime victim assistance fee limits the relief available to the defendant who is released from custody and makes this motion. The present statutory scheme, as set out above, would appear to allow only a deferred payment with conversion of the fee to a civil judgement.

